

Warden, Vivian

From: Lisa Evans <levans@earthjustice.org>
Sent: Tuesday, July 22, 2014 9:46 AM
To: FOIA HQ
Subject: FOIA Request
Attachments: FOIA.EPA.072114_VAPdata.doc

Dear FOIA Officer:

Attached please find a FOIA request for the EPA Office of Solid Waste. If you have any questions, please contact me at this email or the number below.

Thank you in advance for your prompt assistance with this request.

Sincerely,
Lisa Evans

Lisa Evans
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EARTHJUSTICE

Because the earth needs a good lawyer

July 21, 2014

By Email

FOIA Officer
FOIA and Privacy Branch
Office of Environmental Information
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, D.C. 20460

Hq.foia@epa.gov

Re: Freedom of Information Act Request For Information Pertaining to the Utility Solid Waste Activities Group's "Voluntary Action Plan for the Management of Coal Combustion Products"

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, I hereby request information pertaining to the "Voluntary Action Plan for the Management of Coal Combustion Products" (VAP) created by the Utility Solid Waste Activities Group (USWAG). According to USWAG, certain electric utility companies are parties to the VAP, and, pursuant to the plan, these utilities are conducting groundwater monitoring to assess the impact of onsite coal ash impoundments and landfills.¹ Specifically, I request the following documents:

- (1) All documents (including letters, emails or notes of telephone conversations) between EPA and USWAG pertaining to a request for monitoring data gathered pursuant to the "Voluntary Action Plan for the Management of Coal Combustion Products."
- (2) All documents (including letters, emails or notes of telephone conversations) between EPA and any electric utility company pertaining to a request for monitoring data gathered pursuant to the "Voluntary Action Plan for the Management of Coal Combustion Products."
- (3) All monitoring data submitted by USWAG and electric utilities gathered pursuant to compliance with the "Voluntary Action Plan for the Management of Coal Combustion Products;"
- (4) All analyses, memoranda or summaries completed by EPA, USWAG or any electric utility industry pertaining to monitoring data submitted pursuant to the "Voluntary Action Plan for the Management of Coal Combustion Products."

¹ See <http://www.uswag.org/2006/pressrls.pdf>

To the extent that relevant records are available electronically, I would appreciate it if you would provide those records to me in that format.

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. §552(a)(4)(A)(iii) and 5 C.F.R. §1303.70. Earthjustice is a national, nonprofit 501(c)(3) organization with no commercial interest in obtaining the requested information. Instead we intend to use the requested information to better understand the operations and activities of the U.S. EPA with respect to the regulation of coal combustion waste under the Resource Conservation and Recovery Act (RCRA).

We have received fee waivers under FOIA from EPA and other federal agencies in the past. This is because Earthjustice has, since 1971, promoted the public interest through the enforcement of federal environmental laws and the advancement of policies that provide enhanced environmental protection.

Fee Waiver Request Justification

Earthjustice is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, Earthjustice intends to use the requested information concerning the data submitted by USWAG to inform the public, so the public can meaningfully participate in the identification and remediation of hazards associated with coal combustion waste disposal and can meaningfully participate in any EPA rulemakings concerning the regulation of coal combustion waste.

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to EPA's assessments and determinations regarding the hazards associated with coal ash disposal sites. These determinations and the policies and procedures on which they are based are unquestionably “identifiable operations or activities of the government.”

The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. There can be no question that this is such a case.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise in the public domain and are not accessible other than through a FOIA request. Given the hazards associated with coal ash disposal sites, it is important that monitoring data and information relating to government operations or activities involving the problems associated with coal ash disposal sites be made available to the public. This information will facilitate meaningful public participation in the decision-making process, including the on-going coal ash rulemaking. Therefore this information fulfills the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's decision-making process with regard to coal combustion waste disposal sites.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

Earthjustice has a longstanding interest and expertise in the subject of coal combustion waste disposal. More importantly, Earthjustice unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large." Earthjustice has participated in numerous stages of the EPA's coal ash rulemaking, including submitting comments on the proposed rule and on several Notices of Data Availability.

Earthjustice intends to disseminate the information they receive through FOIA regarding these government operations and activities in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on the organizations' websites, emailing and list-serve distribution to members. Earthjustice maintains a webpage solely devoted to coal combustion waste at www.earthjustice.org/coalash, and Earthjustice routinely uses this webpage to disseminate information.

4. The disclosure must contribute "significantly" to public understanding of government operations or activities. The public's understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently no information publicly available regarding the utility industry's compliance with USWAG's Voluntary Action Plan. Absent disclosure of the records requested, the public's understanding will be shaped only by what is disclosed by the private interests involved. The records requested will contribute to the public understanding of the government's role, or their "operations and activities" associated with this critically important information.

The disclosure of the requested records is also essential to public understanding of the impacts that coal combustion waste disposal sites may have on their communities and homes and the broader environment, including but not limited to threats to human dwellings and drinking water sources. After disclosure of these records, the public's understanding of this problem will

be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

Earthjustice has no commercial interest in the requested records. Nor does Earthjustice have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. Earthjustice is a tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such it has no commercial interest. The requested records will be used for the furtherance of Earthjustice's mission to inform the public on matters of vital importance to the environment and public health.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, Earthjustice has no commercial interest in the requested records. Disclosure of this information is not "primarily" in Earthjustice's commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of the scope and magnitude of coal combustion waste disposal sites.

Earthjustice thus respectfully requests, because the public will be the primary beneficiary of this requested information, that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A).

In the event that your Office denies a fee waiver, please send a written explanation for the denial but continue to produce documents until the fee reaches \$200.

Please produce the requested records on a rolling basis. At no time should the Office's search for, or deliberations concerning, any records requested herein delay the production of other records that the Office has already elected to produce.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless; as such disclosure would serve the public interest of educating citizens. See 10 C.F.R. §1004.1 (authorizing disclosure of documents exempt from FOIA disclosure where such disclosure is in the public interest).

In addition, should you invoke a FOIA exemption regarding any of the requested records, we request that you release any segregable portions of such records that are left after the exempted material has been redacted from the records we are seeking.

I appreciate your help in obtaining the requested information. As provided in FOIA, we expect a reply within 20 working days. 5 U.S.C. §552(a)(6)(A)(iii); 5 C.F.R. §1303.10(c).

Please send the requested records by email to levans@earthjustice.org or, for records not available electronically, by regular mail to 21 Ocean Avenue, Marblehead, MA 01945. If you find that this request is unclear in any way, please do not hesitate to contact me by phone at (781) 631-4119.

Thank you for your time and effort. I look forward to your prompt reply.

Sincerely,

s/Lisa Evans

Lisa Evans
Attorney
Earthjustice
781-631-4119